

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

19 CVS
2019 SEP 27 P 4:20
FILED
C.S.C.

CAPITOL BROADCASTING)
COMPANY, INCORPORATED)
D/B/A WRAL-TV; THE NEWS AND)
OBSERVER PUBLISHING)
COMPANY D/B/A THE NEWS &)
OBSERVER; WSOC TELEVISION,)
LLC; THE CHARLOTTE)
OBSERVER PUBLISHING)
COMPANY D/B/A THE)
CHARLOTTE OBSERVER; WTVD)
TELEVISION LLC; WUNC, LLC;)
THE ASSOCIATED PRESS; and)
THE WASHINGTON POST,)

Plaintiffs,)

v.)

DAMON CIRCOSTA, *in his official*)
capacity as Chair of the North)
Carolina State Board of Elections;)
and GREG FLYNN, *in his official*)
capacity as Chair of the Wake)
County Board of Elections,)

Defendants.)

**VERIFIED COMPLAINT,
PETITION FOR WRIT OF
MANDAMUS AND REQUEST FOR
MEDIATION PURSUANT TO N.C.
GEN. STAT. § 7A-38.3E**

Pursuant to Rules 3, 7 and 8 of the North Carolina Rules of Civil Procedure
the plaintiffs, complaining of the defendants, allege and say the following:

Introduction

This action is pursuant to the North Carolina Public Records Law, contained
in Chapter 132 of the General Statutes. As described more specifically in the
numbered allegations set out below, plaintiffs seek:

(1) a preliminary order compelling defendants to appear and bring before the court the records that are the subject matter of this action;

(2) an order compelling the defendants to permit the inspection and copying of public records pursuant to N.C. GEN. STAT. § 132-9(a);

(3) an order in the nature of a writ of mandamus requiring the defendants to comply with the Public Records Law including, but not limited to, N.C. GEN. STAT. § 132-6(a); and

(4) an order, pursuant to N.C. GEN. STAT. § 132-9(c)(1), awarding plaintiffs reasonable attorneys' fees, to be charged against the operating expenses of the responsible agency or to be paid personally by any public employee or public official found by the Court to have knowingly or intentionally committed, caused, permitted, suborned, or participated in a violation of the Public Records Law.

The Plaintiffs

1. Capitol Broadcasting Company, Incorporated ("WRAL") is a North Carolina corporation whose principal place of business is located in Raleigh, Wake County, North Carolina. Capitol Broadcasting is a diversified communications company which, among other things, owns and operates five television stations in North Carolina, including WRAL-TV in Raleigh which covers news in the Research Triangle and surrounding areas of Piedmont and Eastern North Carolina, including Wake County and its surrounds.

2. The News and Observer Publishing Company ("N&O") is a North Carolina corporation that maintains its principal place of business in Raleigh, Wake

County, North Carolina. Among other things, the company publishes *The News & Observer*, a general interest newspaper that is published in Wake County and distributed throughout the surrounding area of North Carolina. The News & Observer also publishes an online edition at www.newsobserver.com.

3. WSOC Television, LLC is a Delaware limited liability company that is authorized by the North Carolina Secretary of State to do business within the state and has its principal place of business in Atlanta, Georgia. WSOC-TV covers news in Greater Charlotte and the surrounding areas of North Carolina and South Carolina, and state-wide issues throughout North Carolina. WSOC-TV also disseminates online coverage at www.wsoc.tv.

4. The Charlotte Observer Publishing Company (the "*Charlotte Observer*") is a Delaware corporation that maintains its principal place of business in Mecklenburg County, North Carolina. Among other things, the company publishes *The Charlotte Observer*, a general interest newspaper that is published in Mecklenburg County and distributed throughout the surrounding areas of North Carolina and South Carolina. The Observer also publishes news online at www.charlotteobserver.com.

5. WTVD Television, LLC ("WTVD") is a Delaware corporation with its principal place of business in Durham, North Carolina. It owns and operates the television station WTVD ABC 11 in Raleigh-Durham, North Carolina. WTVD gathers and disseminates news to the public, serving a twenty-three county viewing

area in central and eastern North Carolina and disseminates its news coverage online at www.abc11.com.

6. WUNC, LLC, is a North Carolina not-for-profit corporation located in Orange County. WUNC operates North Carolina Public Radio, an affiliate of National Public Radio, at 91.5 FM from Chapel Hill; at 88.9 FM from Manteo; at 91.9 from Fayetteville; at 91.1 from Welcome; and at 90.9 FM from Rocky Mount. The station, which also streams online 24 hours a day, provides extensive national and local news coverage, including information about courts throughout North Carolina.

7. The Washington Post (formally, WP Company LLC d/b/a The Washington Post) is a news organization based in Washington, D.C. It publishes *The Washington Post* newspaper and the website www.washingtonpost.com, and produces a variety of digital and mobile news applications. The Post has won 47 Pulitzer Prizes for journalism, including awards in 2018 for national and investigative reporting.

8. The Associated Press ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York, with more than 1,300 U.S. newspaper members. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. On any given day, AP's content can reach more than half of the world's population. AP has no parents, subsidiaries or affiliates that have any outstanding securities in the hands of the public. The AP's North Carolina bureau regularly covers news of

interest in all 100 counties of North Carolina, including news about state government and public policy.

The Defendants

9. Defendant Damon Circosta (“Mr. Circosta”) is the Chair of the North Carolina State Board of Elections (“SBOE”) appointed by the Governor pursuant to N.C. GEN. STAT. § 163-19(b) and is an agency of North Carolina government as defined by N.C. GEN. STAT. § 132-1(a). Mr. Circosta is sued in his public capacity and as the custodian of North Carolina State Board of Elections records that are public pursuant to the Public Records Law.

10. Defendant Greg Flynn (“Mr. Flynn”) is the Chair of the Wake County Board of Elections (“WCBOE”) appointed by the North Carolina State Board of Elections pursuant to N.C. GEN. STAT. § 163-30(a) and is an agency of North Carolina government as defined by N.C. GEN. STAT. § 132-1(a). Mr. Flynn is sued in his public capacity and as the custodian of Wake County Board of Elections records that are public pursuant to the Public Records Law.

Jurisdiction, Venue and Conditions Precedent

11. This Court has subject matter jurisdiction over the issues raised herein pursuant to N.C. GEN. STAT. § 132-9 and otherwise.

12. This Court has personal jurisdiction over all the parties pursuant to N.C. GEN. STAT. § 1-75.4(1).

13. Venue for this action is proper in the Superior Court of Wake County pursuant to N.C. GEN. STAT. §§ 1-77 and 1-82.

14. The North Carolina General Assembly has waived sovereign immunity for plaintiffs' claims by enactment of the North Carolina Public Records Law and otherwise.

15. Plaintiffs respectfully request mediation of this dispute pursuant to N.C. GEN. STAT. § 7A-38.3E. *Accord*, Tillett v. Town of Kill Devil Hills, 89 S.E.2d 145 (2017).

North Carolina Law

16. The North Carolina Public Records Law ("the Public Records Law") is codified at N.C. GEN. STAT. §§ 132-1 through 132-10. The public policy underlying the Public Records Law is set out in N.C. GEN. STAT. § 132-1(b), which provides:

The public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the people. Therefore, it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law. As used herein, 'minimal cost' shall mean the actual cost of reproducing the public record or public information.

17. The Public Records Law provides, in N.C. GEN. STAT. §132-1(a), that public records are defined as:

all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, *made or received* pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions.

(Emphasis supplied)

18. The Public Records Law further provides that "Every custodian of public records shall permit any record in the custodian's custody to be inspected and

examined at reasonable times and under reasonable supervision by any person, and shall, as promptly as possible, furnish copies thereof upon payment of any fees as may be prescribed by law.” N.C. GEN. STAT. §132-6(a).

19. Regarding responses by public records custodians to public records requests, the Public Records Law also provides in N.C. Gen. Stat. §132-6.2(c), as follows:

If the request is granted, the copies shall be provided as promptly as reasonably possible. *If the request is denied, the denial shall be accompanied by an explanation of the basis for the denial.* If asked to do so, the person denying the request shall, as promptly as possible, reduce the explanation for the denial to writing.

(Emphasis supplied)

History and Background

20. On 3 May 2019, Josh Lawson, the then General Counsel for the SBOE, sent an email to 32 county Boards of Election instructing them on how to gather voting histories, signed poll books and redacted ballots dating back several election cycles in response to subpoenas issued by the United States Attorney’s Office for the Eastern District of North Carolina in August 2018. A true and accurate copy of the email is attached as **Exhibit 1**.

21. On 10 May 2019, WRAL on behalf of itself, and later, the plaintiffs in this matter, submitted a public records request to the WCBOE seeking the information referenced in the SBOE 3 May 2019 email. A true and accurate copy of the request is attached as **Exhibit 2**.

22. In response, WCBOE’s public affairs staff responded more than two

weeks later that WCBOE was “prohibited under both federal and state law from releasing any responsive information/documentation that may be in our possession.” The staff also declined to answer questions about which federal and state laws prohibited them from releasing the information and referred questions to Wake County Attorney Scott Warren (“Mr. Warren”). Mr. Warren did not return any of the multiple messages left at his office. A true and accurate copy of the response is attached as **Exhibit 3**.

23. As directed, WRAL on behalf of itself and, later, the plaintiffs in this matter, submitted their questions about the bases for the refusal to provide the requested information to both the SBOE and the Attorney General’s Office.

24. On 13 June 2019, WRAL on behalf of itself, and later, the plaintiffs in this matter, submitted a formal public records request to the SBOE and the other 31 county Boards of Election seeking the information referenced in the SBOE 3 May 2019. A true and accurate copy of the email is attached as **Exhibit 4**.

25. At 8:13 p.m. on Sunday 23 June 2019, the Attorney General’s Communications Director sent an email to Tyler Dukes at WRAL stating, “Hi Tyler, The State Board of Elections is prohibited from providing the records you requested. As you know, there are multiple reasons why a records request might be denied, including exceptions to the Public Records Act, provisions of federal law, court orders, and sensitive public security information. I’m prohibited from providing a reason in this matter. Thanks, Laura.” A true and accurate copy of the email is attached as **Exhibit 5**.

26. Defendants have not provided an explanation of the basis for their denial of the Plaintiffs' request, and Plaintiffs have not been able to identify any justification for the positions taken by Defendants or other similarly situated state agencies.

27. Upon information and belief, the defendant custodians have no intention of voluntarily producing responsive documents to plaintiffs or providing a lawful justification for not producing responsive documents.

28. Upon information and belief, the defendant custodians are knowingly and intentionally violating the Public Records Law.

WHEREFORE, plaintiffs respectfully pray the court:

1. Accord this matter priority and set it down for an immediate hearing pursuant to N.C. GEN. STAT. § 132-9(1);

2. Enter a preliminary order requiring the defendant (a) to bring the requested records before the court for *in camera* review and (b) show cause, if any, why the plaintiffs are not entitled to obtain the requested records;

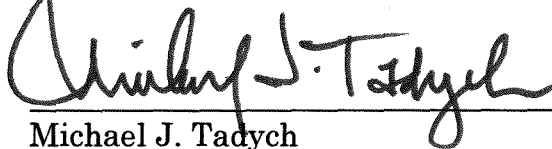
3. Enter an order declaring the requested records and information are public records pursuant to the Public Records Law and requiring the defendants, and all similarly situated county boards of election to provide plaintiffs with copies of the same, access to same or otherwise provide the information made public by statute;

4. Enter an order awarding plaintiffs their reasonable attorney fees pursuant to N.C. GEN. STAT. § 132-9(c); and

5. Provide plaintiffs with such further and additional relief as the court shall deem just, proper and authorized by law, and that the costs of this action be taxed against the defendants.

Respectfully submitted this the 21th day of September, 2019.

STEVENS MARTIN VAUGHN & TADYCH, PLLC

A handwritten signature in black ink, appearing to read "Michael J. Tadych", written over a horizontal line.

Michael J. Tadych

N.C. State Bar No. 24556

Hugh Stevens

N.C. State Bar No. 4158

K. Matthew Vaughn

N.C. State Bar No. 20177

1101 Haynes Street, Suite 100

Raleigh, NC 27604

919.582.2300

866-593-7695 toll free facsimile

Attorneys for Plaintiffs

VERIFICATION OF COMPLAINT

The undersigned, **Tyler Dukes**, having been duly sworn, states that he is an authorized representative of the plaintiffs in the above action, that he has read the foregoing Verified Complaint and that the allegations of fact made therein are true of his own knowledge, except as to the matters alleged upon information and belief, which allegations he is informed and believes to be true.

Signature: 

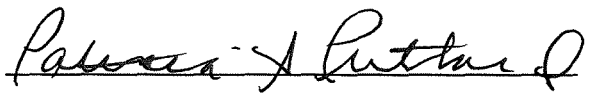
Printed Name: M. Tyler Dukes

STATE OF NORTH CAROLINA)

)

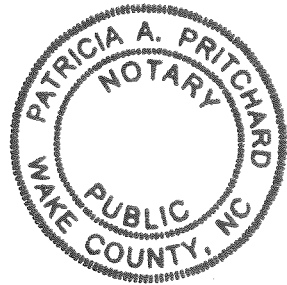
COUNTY OF WAKE)

Sworn to and subscribed before me this the 27th day of September, 2019.



Notary Public

My Commission Expires: 9/5/21.



From: Lawson, Joshua
Sent: Friday, May 03, 2019 6:05 PM
Cc: SBOE_Grp - Legal; Strach, Kim
Subject: Instructions regarding search of local records

Importance: High
Sensitivity: Confidential

To: Beaufort, Bladen, Brunswick, Camden, Carteret, Craven, Cumberland, Currituck, Duplin, Edgecombe, Franklin, Granville, Greene, Halifax, Harnett, Hertford, Johnston, Lenoir, Martin, Nash, New Hanover, Pasquotank, Pender, Perquimans, Pitt, Robeson, Sampson, Vance, Wake, Washington, Wayne, and Wilson County Boards of Elections.

The State Board of Elections Office has continued its work to retrieve certain records preserved under Numbered Memos 2019-01 and 2018-09. We have reached a point at which the Office must require your County to retrieve select documents that may be stored locally. Consistent with obligations under the above Numbered Memos, your County must proceed as follows:

1. **Access Secure FTP.** Open R:\FTP SECURE\CountyUploads_SBE\2019\20190503 and select your County's folder. Load the file using the **encryption key** sent via separate email.
2. **Determine whether a registrant voted.** Use the VR Number or other data to confirm whether the registrant has voted in an election held between **January 1, 2013 and August 30, 2018**. (If not, proceed to Step 4).
3. **If applicable, retrieve any signed poll book or traceable official ballot.** If a registrant has voted, retrieve from storage any official ballot(s) and/or any signed poll book page(s) associated with that registration.
(Note: The Office understands that certain records may no longer exist and that only absentee ballots are traceable to a registrant).
4. **Check for other record(s).** Determine whether your County Board possesses any additional records associated with the registrant that are not already contained within SEIMS.
5. **Scan any record(s) collected.** Once all documents have been collected, the county must scan each document. Please note that any official ballot must be redacted to cover **all** bubbles or other information revealing how a registrant voted.
(Note: It is possible that your County has no records for the registrant(s) identified that are not already in SEIMS.)
6. **Upload any record(s).** Access the Secure FTP and upload all records to your County's folder within R:\FTP SECURE\CountyUploads_SBE\2019\20190503.
7. **Confirm your search is complete.** Please reply to **this email** confirming that your county has completed its search and any made any necessary upload.

The State Board Office is aware of numerous demands on your County's limited staff resources. Thank you in advance for your efforts to retrieve any responsive record from local storage.

We are advised by the Attorney General's Office that the County must avoid any disclosure that could reveal the identity of the registrant(s) transmitted.

Sincerely,

Josh Lawson | General Counsel
o: 919-814-0755 | f: 919-715-0135



WRAL request for voter data submitted to SBOE

Dukes, Tyler

Fri 5/10/2019 5:50 PM

To: 'Gary Sims' <Gary.Sims@wakegov.com>;

Cc: 'Dara Demi' <Dara.Demi@wakegov.com>;

Hey Gary,

Good talking with you today. Per our conversation, and pursuant to state public records law, I request access to and copies of all digitized voter data – excluding any redacted “traceable official ballots” – submitted to the State Board of Elections in response to the agency’s May 3, 2019, guidance from General Counsel Joshua Lawson.

If your county has not yet submitted this information to the State Board of Elections, I’d ask that you please fulfill this request after you have done so.

I’d like copies of these records in electronic format. If you are unable to provide the records in this format for any reason, please let me know.

If applicable, please provide these records as they are processed.

It’s the position of WRAL News that although Mr. Lawson said the state board was advised by the Attorney General’s Office that the county must avoid disclosures that would reveal the identity of the voters contained in this data, no state statute exists that would exempt these data – which are inherently public whether or not they are subject to a subpoena -- from required public disclosure under state law.

As such, if my request is denied in whole or part, I ask that you justify all deletions, redactions or denials by reference to specific exemptions in the state open records act.

If you need any additional information to fulfill this request, please let me know.

--

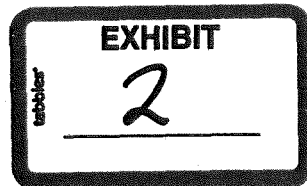
Tyler Dukes

Reporter, WRAL News

tdukes@wral.com

919.821.8949

@mtdukes



Request #19-502

☒ CLOSED

As of September 27, 2019, 3:35pm

Request Visibility: Unpublished

Details

Hey Gary,

Good talking with you today. Per our conversation, and pursuant to state public records law, I request access to and copies of all digitized voter data – excluding any redacted “traceable official ballots” – submitted to the State Board of Elections in response to the agency’s May 3, 2019, guidance from General Counsel Joshua Lawson.

If your county has not yet submitted this information to the State Board of Elections, I’d ask that you please fulfill this request after you have done so.

I’d like copies of these records in electronic format. If you are unable to provide the records in this format for any reason, please let me know.

If applicable, please provide these records as they are processed.

It’s the position of WRAL News that although Mr. Lawson said the state board was advised by the Attorney General’s Office that the county must avoid disclosures that would reveal the identity of the voters contained in this data, no state statute exists that would exempt these data – which are inherently public whether or not they are subject to a subpoena -- from required public disclosure under state law.

As such, if my request is denied in whole or part, I ask that you justify all deletions, redactions or denials by reference to specific exemptions in the state open records act.

If you need any additional information to fulfill this request, please let me know.

[— Read less](#)

Received

May 10, 2019 via email

Departments

Board of Elections, Community Services

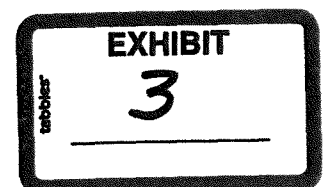
Requester

Tyler Dukes

✉ tdukes@wral.com

📞 919-821-8949

📺 WRAL



Documents

Public (pending) ⓘ

(none)

Requester

(none)

Staff

Point of Contact

Gary Sims

Timeline

External Message

Requester + Staff

Hey Tyler,

Please contact the County Attorney's Office at 919-856-5500 to discuss further.

Thank you!

May 28, 2019, 10:18am by Alice Avery, Communication Specialist (Staff)

External Message

Requester + Staff

Which state and federal laws prohibit the release of this information? My understanding is that this voter registration information is public data.

May 28, 2019, 10:03am by the requester via email

Request Closed

Public

Hi Tyler,

We're prohibited under both federal and state law from releasing any responsive information/documentation that may be in our possession.

Thank you!

May 28, 2019, 10:01am

External Message

Requester + Staff

We have received your public records request and will begin processing it as soon as possible. Please reply to this email if you have any questions.

Thank you,

Wake County Public Records

May 13, 2019, 8:18am

Department Assignment

Public

Board of Elections, Community Services, County Attorney's Office

May 13, 2019, 8:18am

Request Opened

Public

Request received via email

May 13, 2019, 8:18am

Pat Pritchard

From: Dukes, Tyler <TDukes@wral.com>
Sent: Thursday, June 13, 2019 1:43 PM
To: Gannon, Patrick
Subject: WRAL request for voter registration data

Hey Pat,

It occurs to me I haven't made this request formally, so I just wanted to make sure you had it in your inbox.

Pursuant to state public records law, I request access to and copies of all digitized voter data – excluding any redacted “traceable official ballots” – submitted to the State Board of Elections in response to the agency’s May 3, 2019, guidance from General Counsel Joshua Lawson.

I also request any and all documents transmitted to county boards of elections via FTP, as described in Lawson’s May 3, 2019, memo.

I’d like copies of these records in electronic format. If you are unable to provide the records in this format for any reason, please let me know.

If applicable, please provide these records as they are processed.

It’s the position of WRAL News that although Mr. Lawson said the state board was advised by the Attorney General’s Office that counties must avoid disclosures that would reveal the identity of the voters contained in this data, no state statute exists that would exempt these data – which are inherently public whether or not they are subject to a subpoena -- from required public disclosure under state law.

As such, if my request is denied in whole or part, I ask that you justify all deletions, redactions or denials by reference to specific exemptions in the state open records act.

If you need any additional information to fulfill this request, please let me know.

--
Tyler Dukes
Reporter, WRAL News
tdukes@wral.com
919.821.8949
@mtdukes



Pat Pritchard

From: Brewer, Laura <lbrewer@ncdoj.gov>
Sent: Sunday, June 23, 2019 8:13 PM
To: Dukes, Tyler
Subject: following up

Hi Tyler,

The State Board of Elections is prohibited from providing the records you requested. As you know, there are multiple reasons why a records request might be denied, including exceptions to the Public Records Act, provisions of federal law, court orders, and sensitive public security information. I'm prohibited from providing a reason in this matter.

Thanks,

Laura



Laura Brewer

Communications Director
Attorney General Josh Stein

Phone: 919-716-6484

lbrewer@ncdoj.gov

114 W. Edenton St., Raleigh, NC 27603

ncdoj.gov

Please note messages to or from this address may be public records.

